## ELECTION COMMISSION, MALAYSIA v. ABDUL FATAH BIN HAJI HARON

**[S.C. (Mohamed Azmi, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) May 20 & July 28, 1987]**

**[Kuala Lumpur – Supreme Court Civil Appeal No. 161 of 1987]**

*Constitutional Law – Elections – Election petition challenging validity of election of candidates – Death of elected candidate – Duty of Election Commission to hold elections to fill vacancy – Application for injunction to restrain Election Commission from calling for nominations with a view to holding the by-election – Court should decline to exercise jurisdiction so as not to hinder the democratic process – Election Offences Act, 1954, s. 33(1) – Constitution of Kelantan, art. XLVI (5) – Federal Constitution, arts. 113(1) & 118.*

*Elections – Petition challenging validity of election candidate – Death of elected candidate – Duty of Commission to hold election to fill vacancy.*

In this case the respondent, one of the two candidates in the Kelantan State Elections for the constituency of Bukit Tuku, had filed an election petition challenging the validity of the election of the other candidate, Zakaria bin Botok. Before the election petition could be heard the said Zakaria bin Botok died on March 31, 1987. The Chairman of the Election Commission then announced that nominations for the Bukit Tuku by-election as a result of the death of the said Zakaria bin Botok would be held on April 18, 1987, and if there was a contest polling would be held on April 27, 1987. The respondent filed a suit against the Election Commission asking for a declaration that the Election Commission cannot lawfully call for the nominations with a view to holding the by-election before the finalisation of the hearing of the election petition. The respondent also applied for an interim injunction to restrain the Election Commission from calling for nominations with a view to holding the said by-election. The learned judge granted the application with liberty to apply. The Election Commission applied to discharge the interim injunction but the application was refused by the learned judge. The Election Commission appealed.

**Held:** (1) the Court must bear in mind that the Election Commission was performing its constitutional functions under the law. The election process is prescribed under the Constitution. The Election Commission is given a vital role in this democratic process. The Constitution also provides that any matter which has the effect of vitiating an election should be brought up before an appropriate forum;

(2) article XLVI (5) of the Constitution of the State of Kelantan requires that a casual vacancy shall be filled within sixty days from the date on which it occurs. Therefore it is a clear intention of the legislature that the by-election should be concluded according to the time-frame prescribed;

(3) the Court should therefore decline to exercise its jurisdiction so as not to hinder the democratic process.

*Case referred to:*

(1) *Saman Gulam* v. *Tan Sri Haji Mohd. Sunoh Marso & Ors.* See Appendix at p. 718.

IN THE SUPREME COURT.

*K.N. Segara* (Senior Federal Counsel) for the appellant.

*Karpal Singh* for the respondent.

*Cur. Adv. Vult.*

**Hashim Yeop A. Sani S.C.J.** (delivering the Judgment of the Court): Abdul Fatah bin Haji Haron, the respondent in this appeal, was one of the two candidates in the Kelantan State Election for the State Constituency of Bukit Tuku held on August 3, 1986. He lost the election. On October 1, 1986, he filed an election petition in the Kota Bharu High Court *vide* Kota Bharu Election Petition No. 33-1-86 challenging the validity of the election of the other candidate, one Zakaria bin Botok. In the petition he claimed that the said Zakaria bin Botok was not duly elected or returned and that he was the one who was duly elected and ought to have been returned. The hearing of the said election petition was fixed in April 1987 but was postponed because the said Zakaria bin Botok passed away on March 31, 1987. On April 2, 1987, the Secretary to the Dewan Negeri Kelantan wrote to the Secretary to the Election Commission informing the Commission of the death of the said Zakaria bin Botok.

Article 113(1) of the Federal Constitution enjoins the Election Commission *inter alia* to conduct elections to the Legislative Assemblies of the States. Article XLVI(5) of the Constitution of Kelantan provides that a casual vacancy in the Legislative Assembly of the State shall be filled within sixty days from the date on which it occurs. The Chairman of the Election Commission announced on April 6, 1987, that nomination for the Bukit Tuku by-election as a result of the death of the said Zakaria bin Botok would be held on April 18, 1987, and that if there was a contest polling would be held on April 27, 1987.

On April 13, 1987, the respondent filed a civil suit against the Election Commission in the High Court in Kuala Lumpur asking for a declaration that the Election Commission cannot lawfully call for nominations on April 18, 1987, with a view to holding a by-election for the Bukit Tuku constituency before finalisation of the Kota Bharu Election Petition No. 33-1-86. On the same day the respondent made an *ex parte* application by summons-in-chambers for an interim injunction to restrain the Election Commission from calling for nominations on April 18, 1987, with a view to

holding the said by-election. The learned judge granted the application with liberty to apply.

On April 23, 1987, the Election Commission applied to discharge the interim injunction but the application was refused by the learned judge. Hence the appeal. Since there is no written judgment by the learned judge we do not know for certain on what basis or principles the interim injunction was granted. On May 20, 1987, we allowed the appeal and discharged the injunction.

Many grounds of appeal were submitted on behalf of the Election Commission. For the purpose of this appeal we need only consider one as being the most cogent and this is the question of jurisdiction.

It was submitted on behalf of the appellant that there was no jurisdiction for the court to entertain the application of the respondent because the Election Commission was exercising its constitutional functions under Part VIII of the Federal Constitution relating to conduct of elections. It was also submitted that this Court had decided the same in previous appeals – *Saman Gulam* v. *Tan Sri Haji Mohd. Sunoh Marso & Ors.*[1] The three appeals originated from three summons-in-chambers consolidated asking for a number of orders including one that sought for an injunction to restrain the Election Commission and their servants, agents or otherwise from issuing a Writ of By-Election and holding, conducting or continuing with any by-election in a constituency in the State of Sabah. All the applications were dismissed by the learned judge and this Court dismissed the appeals on November 7, 1985. In its oral judgment this court recognises two important aspects of the matter before it then. Firstly, it recognises that the relief sought in the court below was discretionary. Because it was an exercise of discretion the appellate court leans against interfering with the decision of the lower court unless it can be shown that the judge had exercised his discretion on wrong principles of law. Secondly, it recognises the constitutional functions of the Election Commission which are clearly set out in Article 113 of the Federal Constitution to conduct elections to the House of Representatives and the Legislative Assemblies of the State.

It is not that the court has no jurisdiction to hear an application of this nature but that the court must bear in mind that the Election Commission was performing its constitutional functions under the law. The election process is prescribed in the Constitution. The Election Commission is given a vital role in this democratic process. The Constitution also provides that any matter which has the effect of vitiating an election should be brought up before an appropriate forum. Article 118 of the Federal Constitution reads:

> "No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held."

Section 33(1) of the Election Offence Act 1954 states:

> "Every election petition shall be tried by the Chief Justice or by a Judge of any High Court nominated by the Chief Justice for the purpose:
>
> Provided that the Chief Justice shall not nominate a Judge of a High Court of which he is not Chief Justice without consulting the Chief Justice of that High Court."

Any dissatisfaction with or challenge to an election should be brought up by way of an election petition before an election judge and nowhere else.

The law has also prescribed the period during which a by-election should be held. Article XLVI(5) of the Constitution of the State of Kelantan requires that a casual vacancy shall be filled within sixty days from the date on which it occurs. Therefore it is a clear intention of the legislature that the by-election should be concluded according to the time frame prescribed. Any controversial matter arising out of the election should be brought up only after the election is over so that the election proceeding may not be unduly hampered or protracted. If a person is dissatisfied with the election he should bring his complaint before an election judge by way of an election petition. Such complaint should not be made an issue before any court while the election is in progress. Therefore it is not a question of the court having no jurisdiction but that the court should decline to exercise its jurisdiction so as not to hinder the democratic process.

On the above grounds we allowed the appeal with costs to the appellant here and below.

*Appeal allowed.*

Solicitors: *Karpal Singh & Co.*